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ABSTRACT

Proposed revisions of Canada's copyright law are criticized for their failure to address some basic issues of creator's rights, and the academic community's legal responsibility in the infringement of copyrights is discussed. It is argued that the writers of the proposed changes have treated copyrights as property rights without due consideration of relevant cultural, intellectual, and moral issues. The proposed revisions are reviewed, the legislative history of copyright in Canada is chronicled, the definition of copyright is examined, and several of the 137 specific legislative recommendations are used to demonstrate how the users or consumers of copyrighted materials are being ignored in favor of the creators. (MSE)

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COPYRIGHT REVISION AND THE UNIVERSITY

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AT A

CANADIAN SOCIETY FOR THE STUDY OF HIGHER EDUCATION

WORKSHOP HELD AT THE

1987 MEETING OF THE LEARNED SOCIETIES

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JUNE 1987
HAMILTON, ONTARIO

COPYRIGHT REVISION AND THE UNIVERSITY

The revision of Copyright legislation is long overdue. One would assume that universities and other cultural property consumers in Canada could expect that their rights and interests be heard and respected by the legislators.

Unfortunately, the White Paper entitled "From Gutenberg to Telidon" attempted to strengthen the rights of creators and did so with the approach that copyright creators had a business investment which required protection in terms of an economic return. Where the protection of wide-ranging copyright did not extend, the White Paper so extended it without properly defining whether or not copyright was the most reasonable vehicle for the correction of a perceived evil, the total absence or the perceived absence of protection. The White Paper did not deal with non-commercial copyright, but it was redeemable. The White Paper failed to deal with the substantial volume of fugitive creations, but it was redeemable.

The subsequent report of the House Sub-Committee entitled "A Charter of Rights for Creators" refused to consider copyright protected material other than the highly sophisticated, high income earner of cultural industry. In its limited appreciation of how cultural creations come to be, the Sub-Committee completely forgot that reading is the result of education, that art appreciation is not always innate and that research in one form or another is the very basis of many cultural creations. True, the Sub-committee does refer throughout its report to the impoverished creator and the need to support and promote cultural creation, but ultimately its recommendations can only be justified if cultural creation is viewed in terms of PAC-MAN, Corey Hart and Police Academy. The Minister of Communications herself stated:

> "Copyright reform is urgently needed. Miss MacDonald also said: "New technologies have created uncertainties for Canada's arts community from choreographers to Corey Hart"([1])

The proposals put forth in the Charter are beyond redemption simply because the legislators forgot that one cannot ensure a cultural industry without cultural consumers and that a product has viability only insomuch as it has a market. In its desire to create rights for the cultural industry, the Sub-Committee properly associated copyright with property rights but stopped

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[1]- Press release dated May 27th, 1987. - reference NR-87-5273E / 192-25622E.

short of applying all those appendages of property rights, the most important of which is the obligation on he who asserts a property right to assert that right through use and disclosure to the world through registration.

The government's response to the Sub-Committee report fell short of attempting to redeem a series of unredeemable recommendations. It adopted, with or without qualifications, many of the recommendations. It extended copyright in areas that are unjustifiable. Paradoxically, the Sub-Committee simply ensured that the benefits of cultural creations could be forever foreclosed from copyright consumers while such creations which are deemed to be of such great benefit to society that they require property right protection. The benefits that may accrue to society through secrecy thus ensured escape me.

Non-commercial copyright, which represents the much larger bulk of cultural and intellectual creations, was never addressed. Access to creations which are no longer available on the commercial market does not appear to have been considered by the legislators and, in their attempt to protect the rights of minor copyright holders through the creation of collectives, they so fragmented the right as to make it virtually impossible to obtain copyright clearance.

The recent introduction in the House of Commons of the first part of the revision to the Copyright Act merely perpetuates the idea that copyright is a right of the creator and that creators are entirely free to dictate the use, if any, that society may make of their creations. Protecting the right of anonymity by the means of infringement to copyright merely carries the thought process to its very limits.

The introduction to "From Gutenberg to Telidon" states:

> "The collective worth of Canadian industries relying on copyright to provide their basic legal infrastructure is approximately $8 billion. This is equivalent to 2.2 per cent of the Gross Domestic Product. Actual copyright payments within these industries total more than $1 billion, with 67 per cent paid to Canadian sources and 33 per cent paid to non-Canadian sources. It should be noted, however, that the radio and television broadcasting industry accounts for 75% of total payments, with 82% of payments in that industry

> going to Canadian sources. Within industries such as publishing, recording and film industries, just 22 per cent of payments go to Canadian sources while the remaining 78 per cent is paid to foreign rights owners." (2)

A quick calculation would have indicated that of the $250 million produced annually by royalties in areas other than radio and television, $195 million or 78% is paid to non-Canadian sources. The White Paper did not disclose its sources but Statistics Canada reported that for 1984, excluding the film and broadcasting industries, the payment by Canada to foreign sources of royalties, patents and trademarks amounted to $975 million, of which $872 million went to the U.S. while payments flowing into Canada for this account amounted to $41 million of which $26 million was provided from U.S. sources.(3)

The Sub-Committee also approached its task with the attitude that the cultural industry deserved the protection of its revenues by comprehensive legislation, regardless of the cost to Canadians. One of the Sub-Committee's stated guiding principles is to "recognize the major importance of the cultural enterprises" described on page 13 of the report and which reads as follows:

> "The twentieth century has seen the emergence of new media of cultural expression: records, films, broadcasts, computers. As opposed to the more traditional vehicles of creative expression such as writing, drama or art, the new media often require more equipment and a large and diversified creative team. Creation is no longer only a craft but also an industry."

It is evident that revision of copyright provisions was approached from a purely economic perspective. I, on the other hand, intend first to provide you with a quick historical overview of copyright protection, both in the statutory laws and through international conventions. Secondly, I will define the works protected by copyright and finally I will deal with specific recommendations that I suggest will inhibit the very fundamental activities of university teaching and research.

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2 "From Gutenberg to Telidon", 1984, page 1

3- Canada' International Trade in Services 1969 to 1984 - Statistics Canada 67-510, page 29.

Let me at the outset make it clear that the proposed revisions will carry a heavy economic burden for both universities and students. It is unfortunate that additional financial demands will be made on a cash-starved educational system, on students who must carry an increasing debt-load upon graduation and on research whose funding is continuously being eroded. The economic implications are serious but I suggest that the inability to carry out research and teaching to further the knowledge and understanding of the society we live in and to explore and understand the thoughts of those who shaped this society dwarfs the economic considerations. In fact, some of the proposals would imply that the whole world could have access to the inner thoughts of Canadian societal leaders, while that same cultural material would not be available to Canadians.

A HISTORY OF COPYRIGHTS

Historical protection of literary works in British common law jurisdictions is substantially the result of statutory enactment starting with the Copyright Act or the Statute of Anne in 1709.

Prior to that enactment, it appears that copyright in common law was ill defined beyond providing the right to prevent the publication of unpublished works. Although some historians report that in 567 A.D. St. Columba, while still a common mortal, copied a psalter owned by one Finnian. Seized of the dispute, King Diarmud found in favour of the plaintiff Finian. It is interesting to note that this case of literary piracy did not prevent St. Columba either through penance or contrition from being canonized.

The Statute of 1709 provided that authors of not yet published books had sole printing and disposition rights for two consecutive terms of fourteen years if the author was living. It was assumed that common law protection of the copyright then protected the author after the end of the protection period of the Statute. That theory was put to rest by the House of Lords in 1774 - Donaldson v. Becket - when it was decided that the Statute superseded any existing common law rights and the published work, therefore, fell in the public domain after the end of the protection period. The common law right to the unpublished manuscripts, however, appears to have continued as an eternal right.

The term of protection of copyright was replaced by statute in 1814 to provide for a period of 28 years from the date of creation, whether or not the author was alive. The Copyright Act of 1842 which protected books, pamphlets, music sheets, maps and plans further extended the period of protection to 42 years from publication or seven years from the death of the creator, which ever was longer. During the period from 1709 to 1911, some forty-two statutes were passed enlarging the creations protected by copyright. Engravings were protected from 1734, sculptures after 1814, paintings, drawings and photographs after 1862 and musical and dramatic compositions were included in the definition of "book" in 1842.

The Copyright Act of 1911, a British statute applicable throughout the Commonwealth including Canada, was intended to be a complete code of copyright abolishing any vestiges of common law copyright, defining the extent of the creations protected by copyright, as well as its term and infringements.

Canada's Copyright legislation was enacted in 1926 and is a complete code of the protection of the rights of creators. The present proposals for revision will result in the first overhaul of this legislation in more than sixty years.

Internationally, copyrights were addressed in the Berne Convention of 1886. This international convention, to which Canada is a party, sought to extend the protection of copyright throughout all of the signatory countries. It has been revised on at least seven occasions and Canada, considering the state of its national legislation, has adhered to the Rome text of that convention (1928) but has not adhered to the subsequent revisions of Bruxxels (1948), Stockholm (1967) and Paris (1971).

Another international convention known as the Universal Copyright Convention is also part of the international obligations undertaken by Canada. This latter international agreement includes the United States which is not party to the Berne Convention.

Canada's copyright legislation, therefore, must reflect our international obligations relative to the Berne Convention and the Universal Copyright Conventions. When arguing for the protection of the rights of cultural consumers, the vague argument of Canada's international undertakings is raised. The obligations are best summarized in an information booklet accompanying the draft legislation introduced in the House of Commons on May 27th, 1987 and read as follows:

" Canada is a member of two international copyright conventions -- the Berne Convention and the Universal Copyright Convention. These conventions require each member country to grant the protection of its copyright law to the works of nationals of the other member countries. The Universal Copyright Convention provides somewhat lower standards of protection than the Berne Convention."(4)

COPYRIGHT DEFINED

The basis for the protection of copyright was and still is the subject of dispute. One school of thought argues that protection is a natural right recognizing the personal right to protect oneself because the cultural creation is an extension of the person projected into an intellectual creation. Another school of thought argues that copyright protection is required to stimulate and promote cultural and intellectual creation for the benefit of society. This difference in approach is presented in the Royal Commission of 1957 as follows:

"Copyright is in effect a right to prevent the appropriation of the expressed results of the labour of an author by other persons ... The right is regarded by some as a 'natural right' on the ground that nothing is more certainly a man's property than the fruit of his brain. It is regarded by others as not a natural right but a right which the state should confer in order to promote and encourage the labours of authors. Generally speaking, those who appeared before us advocating long and strong protection held the first view; those who were in favour of weaker and shorter terms of protection held the second."(5)

The Royal Commission did not decide on which basis Canada should provide copyright protection and neither did the Sub-Committee, except for its stated purpose of promulgating a "Charter of Rights" for one segment of the cultural industry: the creators.

Patented inventions, like cultural creations, are a creation of the brain. Given that inventions are beneficial to society, the inventor must make a sufficient disclosure to enable a reasonably

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4- "Amendment to the Copyright Act" - Information booklet-Government of Canada - May 1987, No. 192 25600E/FS-87-3807E

5- Report of the Canadian Royal Commission on Patents, Copyrights, Trade Marks and Industrial Designs, 1957.

skilled person to replicate the invention before patent protection is afforded. Disclosure must occur within short and prescribed time limits, otherwise the invention falls into the public domain, protected only to the extent that the inventor secrecy will afford.

The United States recognized early that societal benefit was the basis for protection and required disclosure for protection of copyright to apply. It is interesting to note that the first copyright legislation in the State of Connecticut had the following preamble:

> "Whereas it is perfectly agreeable to the Principles of Natural Equity and Justice, that every author should be secured in receiving the Profits that may arise from the Sale of his Works, and such security may encourage Men of Learning and Genius to publish their Writings, which may do Honor to their Country and Service to Mankind ...
>
> And Whereas it is equally necessary, for the encouragement of Learning, that the Inhabitants of this State be furnished with useful Books at reasonable Prices..."([6])

The statute went on to impose upon the author the obligation to furnish the book in sufficient quantities and at reasonable prices and, in default, a judge of the Superior Court was authorized to issue a compulsory licence.

Copyright is a property right. It is a "right in rem", that is, a right in the object itself. Property rights, on the other hand, cannot be appropriated or lost except through the principle of higher domain, that is where there are compelling reasons of public policy which supersede the individual rights of property. The rights can be asserted against the whole world and their judicial recognition binds even those who were not a party to the action.

On the other hand, property rights must be asserted: the law will not assist a person who is delinquent in asserting those rights. Limitation periods provided in a variety of statutes can put an

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6- From Rituals to Royalties (An Anatomy of Literary Property) - Richard Wincor (Walker and Company, N.Y.) page 47.

end to those property rights. Real property rights are lost after ten years of failing to assert ownership rights against a squatter. Personal property rights are extinguished when the debt or the right of recovery of the article is statute-barred. In the area of intellectual rights, the limitation periods merely extinguish the right of action relating to a particular infringement.

Similarly, property rights must not only be asserted but must be conveyed to the whole world through a registration process. Real estate property rights must be registered under the Registry Act or the Land Titles Act, personal property rights must be registered under the Personal Property Securities Act, even intellectual properties such as patents, trade marks and industrial designs must be registered under the applicable legislation.

Copyrights, however, arise from the creation. Registration, which is not compulsory, merely affords a rebuttable presumption of ownership of that right. Usually, the transfer, licencing or alienation of the whole or part of the property right -- whether it be forever or temporary -- must also be registered to be enforceable against a bona fide third party. Prevailing copyright registration does not require that the alienation of the right be registered so that even a search of the registration records of copyrights cannot provide assurance of the identity of the owner of the copyright.

The object of copyright protection identified in the existing legislation as "every original literary, dramatic, musical and artistic work"([7]). This expression is further defined as follows:

> " every original literary, dramatic, musical and artistic work includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatics-musical works, musical works or compositions with or without words, illustrations, sketches, and plastic works relative to geography, topography, architecture or science." ([8])

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[7] - Copyright Act, C-30, RSC 1970, section 4

[8]- idem, section 2.

I will spare you from reading the other 13 paragraphs of the definition section of the Act which further break down and add to this definition. Suffice it to say that the object of copyright protection is any intellectual creation which does not fall within the definition of:

- an invention defined as: "any new or useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter" (9);

- a trademark, defined as: " (a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others, (b) a certification mark, (c) a distinguishing guise, or (d) a proposed trade mark" (10);

- an industrial design, which is not defined by the existing legislation but the proposed legislation introduced on May 27th would import into that statute the following definition: " features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye."(11)

Suffice it to say that copyright extends to any product of the intellect other than those three forms of intellectual properties defined above, providing that it is original and fixed. The property is original if the expression and not the substance of the creation is new and different, enabling the same thoughts to be expressed in different terms and remain original. The creation must also be fixed in some medium which is capable of physical observation. For example, a lecture in spoken words does not qualify for copyright protection but the notes of that lecture are protected. Similarly, a live television program is not protected but a recorded program is.

9- Patent Act, RSC 1970, chapter P-4, section 2.

10- Trade Marks Act, RSC 1970, chapter T-10, section 2.

11- "An Act to amend the Copyright Act" - Bill C-60 - 35-36 Elizabeth II, 1986-87.

Artistic or creative quality, or merit is not a requirement for copyright protection, only originality and fixation. The issue of merit was dealt with by the Sub-Committee of the House of Commons as follows:

> " There is an important characteristic of copyright as an income-generating mechanism: it rewards popular success rather than just effort. In this sense copyright provides a very democratic reward system because its outcome is the result of a cumulative process of choices - and of the expression of preferences - by thousands, even millions, of individuals. The copyright system constitutes a running poll about which works and which performers are of interest. **Neither the Copyright Act nor the courts that interpret it can impose standards of taste.**" (12) - emphasis added.

Under the existing legislation the protection of copyright, other than in exceptional cases, extends for fifty years from the death of the creator. The first exception is that the 50 years of protection may, in some instances, begin from the date of creation. The second and most important exception is that a creation which has remained unpublished never loses the right to the protection of copyright unless and until it has been published with the authority of the creator, the heirs, successors and assigns. I will return to the way in which this issue has been dealt with by the Sub-Committee and by the government's response. Suffice it to say that, in theory, any unpublished literary, dramatic, musical or artistic work is subject to eternal copyright protection.

This then begs the question: what is the protection inherent in copyright? The existing legislation, the proposed revision and Canada's international obligations provide that copyright is the exclusive right of the creator to authorize the copying of the creation not only in its original medium but also by any other medium, for example the printing of a handwritten manuscript, the photography of a sculpture or the performance of written music. For our purposes, the protection afforded by copyright is the right to control the communication of the creation to the public.

12- A Charter of Rights for Creators, Report of the Sub-Committee on the Revision of Copyright, page 5.

Copyright as it now stands can be fragmented both in terms of use and of geographical boundaries. The creator can assign the right with limitations on the extent to which the assignee can reproduce the work, or on the geographical area in which the assignee can communicate the creation. This means that the user may not have obtained clearance even though he has sought copyright clearance from the publisher and has paid a fee to the publisher in question. The creator may or may not have the right or may have disposed of that part of the right which he proposes to clear. This is significant in that there is no way of ascertaining the quality of the clearance obtained before infringement.

The medium in which clearance has been assigned may be limited so that a gallery obtaining an original work of art does not, per se, obtain the right to print a photograph of that work of art in an exhibition catalogue. The proposed legislation would go one step further and recognize a right of exhibition. This means that the right to exhibit in public does not necessarily follow the sale of a painting, sculpture or artistic work -- even when the work is acquired by a gallery from a private collection.

For our purposes, the protection of copyright is the legal right of the creator of any product of the intellect to limit public access to the creation by controlling the right to copy the work. When speaking of any product of the intellect, we do not speak of a product of intelligence which is original, creative or objectively artistic. The legal right is assigned, with potential limitation, to commercial entrepreneurs of cultural industries making it virtually impossible to ascertain the true owner of the particular right sought by the potential consumer or user. Having no registration system does not provide reasonable certainty as to whom is the actual or real owner of the right, all at the peril of the cultural consumer.

The proposals for revision merely exacerbate the unknown, extend copyright protection to unwarranted areas and, unfortunately, clarify those areas where universities and cultural consumers have previously been able to benefit from work because of the uncertainty of the law. The rights of cultural consumers are being trampled on by bureaucrats and legislators who have failed to recognize the cultural values of literary, dramatic, musical or artistic works.

SOME OF THE RECOMMENDATIONS

On May 27th, 1987 the government proceeded to present Part I of the copyright revisions. Part II will apparently be presented in the Fall of this year. We are asked to comment intelligently on this peace-meal presentation of the revisions. I find myself in the position of the men's wear salesman who is asked to suggest a tie colour without being advised of the colour of the suit or shirt.

For the purpose of discussion, I will use only a few of the 137 recommendations put forth by the Sub-Committee to demonstrate that, in the revision of Copyright laws in Canada, the users or consumers -- of which the university community stands high -- have all been ignored in favour of the Corey Harts of this world. Every press release that I have seen on the subject refers to the two cents per side provided for in the law for the copying of a musical performance. I will agree immediately that the compensation is sixty years out-of-date. I will agree immediately that provision of the Copyright Act had to be amended. If raising the maximum fine from $200 to $1,000,000 over a period of sixty years is any indication of the dimension of the charge, one could assume that the two cent royalty for each side of a record will be raised to $500. However, that is not the issue for the principal consumer of copyright.

The proposed legislation tabled in the House of Commons on May 27th provides that anonymity is a moral right to be protected to the same extent as real rights or economic rights. An anonymous creator can and must forever remain anonymous. This may produce a resurgence of the marketability of "Anon" as a creator. However, is it not fundamental to our understanding of the world and the society we live in, to understand the thought processes, the values and the beliefs of those who helped shape the society in which we live? The persons who shape the world we live in are not necessarily always those who set out to do so. The society in which we live is more often shaped through public opinion garnered from a variety of cultural creations and accidental limelight. When this concept is further tied in with the continuance of eternal copyright for unpublished works, the situation becomes intolerable. Lost manuscripts will never be published in Canada. The private diaries of past Prime Ministers may never become accessible to Canadians. These works, however, will be accessible to foreign jurisdictions that do not recognize the moral right to discover who Anon is and the unending copyrights

in unpublished works. If the works of Shakespeare are in fact the product of numerous anonymous writers, Canada will never know, for the publication of that fact will be illegal, although most of the rest of the world will be allowed to share in that secret.

The Sub-Committee recommended as follows: "Fair dealing should not apply to unpublished works".([13]) The government's response agreed in general, but stated that fair dealing would extend to unpublished works deposited with archival or conservation institutions. To fully assess this recommendation and the response, it must be realized that it is considering fair dealing as only the right to copy "for the purposes of private study, research, criticism, review, or newspaper summary."([14]) Neither the Sub-Committee nor the government were looking to the right to publish. In fact, recommendation 84 of the Sub-Committee, which was agreed to in the government's response, was that fair dealing be revised to indicate that the research must be "private" to qualify for the defence.

How much of our social science and humanities research is based on unpublished materials? Some great writings, as you know, have been found in cellars and attics, and in collections that are privately owned. How much of our understanding of knowledge is based on unpublished creations? It is important to bear in mind that copyright applies to any original creation which is fixed and original, without judgement of its artistic value.

The government's response speaks of fair dealing in unpublished works "deposited" in archival or conservation institutions. It is not clear by whom they are to be deposited. I assume, from the context in which the recommendation and the response arrive, that it means deposited by someone authorized to assign the copyright. If so, that immediately excludes the deposits by so-called literary executors, by a single heir trying to dispose of grandpa's old things without the consent or knowledge of the other heirs, or deposits of business documents and archives of associations and organizations to the extent that they contain material received from outside sources where no employment linkage existed, such as correspondence.

13- Recommendation 86.

14- Copyright Act, section 17(2)(a).

Another source of concern is the fragmenting of copyright to the point where obtaining successful clearance for use becomes virtually impossible. The Sub-Committee recommends the creation of rights in editions (Recommendation 18), the right of performers (Recommendation 71) and the moral rights to the use of works in association with products, services, causes or institutions (Recommendation 5). Universities are beginning to and being encouraged to embark on distance learning initiatives, inevitably using audio-visual techniques. Politicians and business executives have stated publicly that universities have been too reticent in the use of modern pedagogical techniques to make themselves more relevant to the needs of society and to respond to the accessibility needs of those who do not reside in university communities. The Sub-Committee relented and recommended an educational exception to allow the transmission and retransmissions of a work within the confines of a single educational institution (Recommendation 90). The government agreed in its response. I assume that transmission and retransmissions refers to electronic delivery systems such as radio and television. But can copyright clearance be obtained readily by the university? The creator has a right which may or may not have been assigned in whole or in part. If it is a writing, the editor has a right which may or may not have been assigned in whole or in part. If it is a performance, each and every performer has a right which may or may not have been assigned in whole or in part. Those involved in the creation itself may have rights if they were not employees and those rights may or may not have been assigned in whole or in part.

The answer provided by the proposed revision is that blanket licenses issued by collectives will remedy all of the ills that will flow from the revised legislation. It should be noted, however, that the owner of the right need not participate in the collective, that the number of collectives are not limited, that the collectives need not even provide for blanket licenses (in fact CAPAC does not provide for blanket licenses) and that the volume of copyright royalties being exported to foreign lands indicate that not only is there no tradition of collective participation as exists in the field of musical performance, but it is an unknown concept in the national legislation of the vast majority of creators whose rights are being utilized. In addition, all of these complexities must be assessed in a property law context that provides no verifiable means of ascertain who has what rights!

As a final point, I would like to raise the Sub-Committee's recommendations that there be no Crown copyright except in very restricted circumstances ([15]) and that statutes, regulations and judicial decisions of courts and tribunals at all levels of jurisdiction should be in the public domain ([16]). As far as the first recommendation, it would mean that submissions sent to Parliament, Legislatures or to public bodies of inquiry should be in the public domain from the time of their receipt ([17]). The government's response is in general agreement but asks for further study of those government documents in which copyright should subsist. The latter recommendation proposes that any member of the public should have access to the very documents that carry the Law of the land.

The practical application of those two recommendations must be assessed in light of Recommendation 18 of the Sub-Committee which reads as follows:

> " In view of the originality involved in their preparation, editions of literary, dramatic, musical and artistic works should be protected against unauthorized reproduction for 25 years from publication. Protection should be extended on a reciprocal basis to those countries with similar protection."

Many of the literary works referred to in recommendations regarding Crown copyright are published by private firms, Canada Law Book - Butterworths and CCH. The texts will be in the public domain and anyone prepared to rewrite the texts may do so, but photocopying from the edited text will continue to be illegal. The government's response has not stated clearly whether or not editions from the Queen's Printer will be protected by the new copyright to editions. In the past, the government has taken the position that many reports must be purchased from the Queen's Printer to off-set the costs of production. Both the White Paper and the Report of the Sub-Committee carry the claim to copyright specified under the terms of the Universal Copyright Convention. The message seems to be that the texts will be in the public domain providing that one is ready to re-write the texts but not to photocopy them.

15- Recommendation 11.

16- Recommendation 10.

17- Recommendation 13.

CONCLUSIONS

I have touched on only a few of the recommendations dealing with copyright and how these may impact on scholarly and teaching activities within our universities. The more I study the issues, the more hurdles I encounter. The proposed revisions do not only allow Michael Snow to prevent the tying of Christmas ribbons to the necks of his geese in the Eaton Centre, as the Minister of Communications asserted, they also mean that when our galleries acquire works of arts, they may not acquire the right to exhibit those works of art and if so may only do so in circumstances dictated by the creator.

To the educators of this country, the message is clear. Prior to the formulation of recommendations 90 and 91, which in fact restrict even the limited educational exceptions that exist in the present law, the Sub-Committee has the following to say with respect to the importance of education in its assessments of rights:

> " The Sub-Committee has already stated that copyright is the legal recognition of the property rights of creators in their legal works, and that property carries with it the notion that the rights attaching to it should not be limited unless their is a demonstrated public policy reason to do so. Applying these principles leads the Sub-Committee to the conclusion that the needs of education should not override the rights of creators. If the needs of education justified limitations to rights, then the teachers and caretakers should not be paid. Nor should the utilities, such as water or hydro, used by schools be paid for." (18)

Economics are not, were not and may well never be the primary issue if I take it as an act of faith that both levels of government will compensate the economic impact through increased funding to institutions and students. Accessibility is a much more important issue. The Sub-Committee should have appreciated that fact for it did so in another area, that of retransmission rights for broadcasting, as indicated in the following excerpt of its report:

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18 - A Charter of Rights for Creators, page 70.

> " Although the sub-committee does not in general favour compulsory licencing, it sees no other possibility in this case. Providing exclusive rights to copyright owners to authorize retransmission would enable them to prohibit the retransmission of signals the CRTC requires the system to carry. It would also give copyright owners the legal right to stop all retransmission activities by refusing authorization altogether. Copyright owners should not be permitted to stop retransmission because this activity is too important to Canada's communication system."(19)

The AUCC made two crucial recommendations relative to copyright revision. The first was that, while we have no objections to and indeed support moral rights, the claim to economic rights should be subject to some form of verifiable registration: this is consistent with property rights. The costs presumably associated with registration surely could be afforded by the owners of those creations targeted by the recommendations of the Sub-Committee. The freedom to publish, while recognizing the moral integrity of the creator, would have met the objectives pursued by the Sub-Committee without doing violence to the protection of the creators' economic rights.

The second recommendation was that there be collectives, but that their numbers be limited, and that fugitive or random creators be bound to seek financial recovery from the collectives where a fund should be created by them from licencing revenue. This is inconsistent with the concept of property right and ensures that the purchase of a licence is precisely what it means: the purchase of a right. The advisers of the Sub-Committee do not appear to have considered the Torrens system of guaranteed titles or Land Titles.

In the press conference introducing Bill C-60, the Minister of Consumers and Corporate Affairs said:

> " We are working to strike a balance between copyright owners and users. If done well - and I am convinced that this first step takes us in the right direction - we will meet our dual objectives to encourage and reward individual initiative and to spur economic growth in copyright industries." (20)

19- A Charter ..., page 80.

20- Opening Remarks by the Honourable Harvie Andre, Minister of Consumer and Corporate Affairs Canada for a press conference on proposed changes to the Copyright Act - Ottawa, May 27th, 1987. - CCAC No. 192 25624 E

As a user I have yet to find in the Sub-Committee report, the government's response or Bill C-60 one single element that favours the consumer.

There is a real risk assumed by the universities and their researchers who breach copyright by publishing of works of long deceased creators whose heirs cannot be located, identified or otherwise. Admittedly, the potential copyright owners may never surface to enforce those rights. In fact, many may not even know that they possess those rights, but surely infringement of the law can never be condoned on the basis that the risks are small. In any event, Bill C-60 introduces substantial criminal penalties for infringement and one would have thought that public authorities have an obligation to enforce criminal laws even where there is no identifiable victim.

I have dealt with only a small portion of the potential impact of copyright revision on scholarly activities. The proposals have far reaching implications that could, for instance, inhibit creative activities such as parodies because they are a distortion, a mutilation or a modification of the original work which could be to the prejudice of the honour or reputation of the author. Students may never again be able to enjoy the following excerpt of a parody of Pierre Corneille's "El Cid":

- Rodrigue, Rodrigue hath thee no heart.
- No dear, just spades, I'll pass.

Pierre-Yves Boucher, AUCC
May 1987